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No. 98-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

STEPHANÉ BOURCHIER DE CARBON;
SOCIÉTÉ CIVILE DE GESTION
DES ACTIONS DE CARBON,

Petitioners,

v.

GENERAL MOTORS CORPORATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY OF THE PETITIONER

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REPLY OF THE PETITIONER

INTRODUCTION

Respondents in their Brief in Opposition ("BIO") unleash a flurry of irrelevant misstatements in the vain hope of diverting the Court's attention from the issue before it. We address those misstatements below. But most important for the Court's purposes is that respondents cannot and do not dispute that this case is an appropriate vehicle to resolve the question presented. The district court dismissed petitioners' complaint *with prejudice*. Pet. App. 9a. The Ninth Circuit held the order of dismissal was non-appealable, *id.* 19a; three other circuits have reached the opposite conclusion and recognized such an order for what it is: a final and appealable disposition of the case. Four separate Petitions presenting the question now are pending here (Pet. at i; No. 97-1895, *McCarthy v. Providential Corp.*, 122 F.3d 1242 (9th Cir. 1997); No. 98-279, *Napleton v. GMC*, 138 F.3d 1209 (7th Cir. 1998); No. 98-415, *Seacoast Motors v. Chrysler Corp.*, 143 F.3d 626 (1st Cir. 1998)[1]), and this Court should grant certiorari to resolve the conflict.

Respondents cobble together some excerpts from this case's procedural history, and manufacture still others, to contend that petitioners are engaged in "forum shopping." Thus, respondents assert that petitioners "have litigated" their claims "in France for years" but "did not succeed on the merits." BIO at 2. That assertion is false: respondents have succeeded in preventing *any* French tribunal from *ever* ruling

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[1] Petitioners in this case and *Seacoast Motors* are represented by joint counsel. To the extent the Court has concerns regarding which of the four Petitions presents the best vehicle to resolve the question presented (an issue that is discussed in the *Seacoast Motors* Petition (at 5-9)), we recommend that the Court grant certiorari in both this case and *Seacoast Motors* and consolidate the two cases. *Cf. Muscarello v. United States and Cleveland v. United States*, Nos. 96-1654 and 96-8837, 118 S. Ct. 191 (1998). We also recommend that the Court direct the parties to brief the appealability of an order of dismissal under *both* 9 U.S.C. § 16 and 28 U.S.C. § 1291. *See* Pet. for Cert., *Seacoast Motors v. Chrysler Corp.*, at 8 & n.3.

on the merits of petitioners' claims. (ER 970, Tab 26.) Respondents did so by arguing that "the arbitration panel *does not have jurisdiction* [to address Petitioners' tort claims], because the [parties' arbitration clause] deals only with the disputes that arise out of the [contracts containing the arbitration clause] *and nothing else*." (ER 1204, Tab 39 (emphasis added).) Respondents' argument was accepted by the International Chamber of Commerce (the body that governs the arbitration), as well as three French courts, including the Supreme Court of France. (ER 683, Tab 10; ER 1018, Tab 26, Appellants' Request for Judicial Notice, Ex. B, at 4.) Petitioners therefore had no choice but to pursue the merits of their U.S. law claims in the U.S. courts. That is not "forum shopping."

I. THE CIRCUITS ARE DIVIDED IRRECONCILABLY OVER THE QUESTION PRESENTED.

Respondents cannot deny the deep split among the circuits over the question presented. Respondents are correct that the circuits uniformly have recognized a distinction between "embedded" and "independent" actions; but that point is irrelevant: *within* the class of embedded actions, the circuits have divided five to three over whether a party may appeal an order of dismissal. The objective proof of this conflict is that *all* of the circuits that refuse to find appellate jurisdiction in these circumstances acknowledge that other courts of appeals reach the opposite conclusion. *See Seacoast Motors*, 143 F.3d at 628 (acknowledging that Third, Sixth and Tenth Circuits "have determined that an order of dismissal accompanying an order favoring arbitration is appealable as a final decision, even if the proceeding is embedded"); *Napleton*, 138 F.3d at 1212 (7th Cir.) (2-1 decision) (acknowledging that "[b]oth the Tenth and Third Circuits have held that a dismissal in favor of arbitration is an appealable decision, even in an embedded proceeding"; citing also *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990)); *McCarthy*, 122 F.3d at 1243-45 (9th Cir.) (2-1 decision) ("*But see*" citation to decisions of Sixth and Tenth

Circuits); *Altman Nursing v. Clay Capital Corp.*, 84 F.3d 769, 770-72 (5th Cir. 1996) (rejecting Sixth Circuit's decision in *Arnold*); *Gammaro v. Thorp Consumer Discount Co.*, 15 F.3d 93, 95-96 (8th Cir. 1994) ("*But see*" citation to *Arnold*). In addition, forceful dissents in the Seventh and Ninth Circuits advocated the contrary rule applied by other circuits. *Napleton*, 138 F.3d at 1216 (Wood, J., dissenting) ("Like my colleagues in the Tenth and Sixth Circuits, however, and like the dissenting judge in the Ninth Circuit decision on which the majority relies so heavily, I see nothing in § 16(a)(3) that justifies such a reading."); *McCarthy*, 122 F.3d at 1248 (Pregerson, J., dissenting) ("[T]he Sixth and Tenth Circuits have held that, where the district court dismisses the action upon ordering arbitration, the order is an appealable final decision."). For its part, the Seventh Circuit denied rehearing *en banc* in *Napleton* only by a five-to-five vote, with Chief Judge Posner, and Judges Easterbrook, Cummings, Rovner, and Wood dissenting.

Respondents acknowledge a square conflict with the Sixth Circuit's decision in *Arnold v. Arnold Corp.*, 920 F.2d 1269 (6th Cir. 1990) (*see* BIO at 16-17), but attempt to disclaim a conflict with the Third and Tenth Circuits. According to respondents, the Third and Tenth Circuits have applied their *own* prior circuit precedents incorrectly. But respondents' contention is entirely academic: not only have the Third and Tenth Circuits squarely addressed this question and found appellate jurisdiction on these facts; but in so doing, they considered *precisely* the cases on which respondents rely and concluded that those cases did not compel a different outcome.

Specifically, respondents do not deny that the Third Circuit addressed this exact question and found appellate jurisdiction in *Nationwide Insurance Co. v. Patterson*, 953 F.2d 44 (3d Cir. 1991). Respondents instead contend that *Nationwide Insurance* incorrectly distinguished *Zosky v. Boyer*, 856 F.2d 554 (3d Cir. 1988), decided *before* the appealability sections of the Federal Arbitration Act (9 U.S.C. § 16) even took effect. The Third Circuit in *Nationwide Insurance* addressed *Zosky* at length and squarely held that it was not

controlling; the matter therefore is settled. But even if the Third Circuit's analysis of *Zosky* were relevant here, that analysis is correct. *Zosky* involved *not* a dismissal of a plaintiff's case but instead an order in which "[t]he magistrate *retains jurisdiction*." 856 F.2d at 559 (emphasis added). The court in *Nationwide Insurance* therefore correctly distinguished *Zosky* on the ground that "[h]ere, although the result of the district court's order is that the parties will arbitrate their dispute, the district court's dismissal of Nationwide's action plainly signifies that this arbitration *is not a part of any ongoing proceeding*." 953 F.2d at 46 (emphasis added).

Respondents also do not deny that in *Armijo v. Prudential Insurance Co.*, 72 F.3d 793 (10th Cir. 1995), the Tenth Circuit squarely found that appellate jurisdiction exists on these facts. Respondents instead claim that *Armijo* improperly distinguished *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994). But the Tenth Circuit in *Armijo expressly* concluded that *Adair Bus Sales* did not compel a contrary conclusion, 72 F.3d at 796-97; that is all that matters here. There is, moreover, a clear conflict between the decision below, in which the Ninth Circuit left the district court's order of dismissal with prejudice in place, and *Adair Bus Sales*, in which the Tenth Circuit vacated and remanded the district court's dismissal of the plaintiff's complaint and instructed the district court to enter a stay (25 F.3d at 955-56).[2] As we explain below, a stay differs substantially from a judgment of dismissal.

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[2] *Armijo* limits *Adair Bus Sales* to cases in which the district court *sua sponte* dismisses the complaint rather than imposing a stay as requested by the defendant. 72 F.3d at 797.

II. THE QUESTION PRESENTED INVOLVES AN IMPORTANT AND FREQUENTLY RECURRING QUESTION OF FEDERAL LAW.

Respondents claim that the question presented here is unimportant and rarely arises. That is demonstrably wrong. Questions about the basic right of aggrieved litigants to appeal error and the power of appellate courts to correct it are fundamental to due process. These questions are no less important when applied to the dismissal of a civil action when a district court (as here) wrongly concludes that a party has submitted its claims to arbitration, thereby effectively waiving its First and Seventh Amendment rights of petition and trial by jury.

In more than a dozen cases in the past year alone, district courts have dismissed the plaintiff's complaint in favor of arbitration, thereby directly implicating the conflict among the circuits.[3] Even now, the appealability of such a dismissal is pending before both the Second and Eleventh Circuits. *See Goldberg v. Merrill Lynch*, 2d Cir. No. 98-7955 (appeal from 1:97cv08779 (S.D.N.Y.)), Docket Entry (argument set for "as

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[3] *Talegen Holdings v. Fremont Gen. Corp.*, No. 98-Civ.-0366, 1998 U.S. Dist. LEXIS 12805 (S.D.N.Y. Aug. 19, 1998); *Goldberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 97-Civ.-8779, 1998 U.S. Dist. LEXIS 8906 (S.D.N.Y. June 18, 1998); *Pelegrin v. United States Filter Corp.*, No. 97-390-SLR, 1998 U.S. Dist. LEXIS 5332 (D. Del. Mar. 31, 1998); *UPS v. International Brotherhood of Teamsters, AFL-CIO*, 999 F. Supp. 70 (D.D.C. 1998); *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410 (M.D. Ala. 1998); *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410 (M.D. Ala. 1998); *Merchant v. Weissman*, No. 97-C-2205, 1997 U.S. Dist. LEXIS 17772 (N.D. Ill. Nov. 5, 1997); *Lopez v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, No. 97-C-3407, 1997 U.S. Dist. LEXIS 16921 (N.D. Ill. Oct. 28, 1997); *Clayton v. Woodmen of the World Life Ins. Soc'y*, 981 F. Supp. 1447 (M.D. Ala. 1997); *Murillo v. Allstate Ins. Co.*, No. C-97-2431, 1997 U.S. Dist. LEXIS 16667 (N.D. Cal. Oct. 14, 1997); *Boyd v. Homes of Legend*, 981 F. Supp. 1423 (M.D. Ala. 1997); *Valdiviezo v. Phelps Doge Hidalgo Smelter, Inc.*, 995 F. Supp. 1060 (Sept. 29, 1997); *Sellers-Raddish v. Paul, Hastings, Janofsky & Walker, LLP*, No. 3:97CV01117, 1997 U.S. Dist. LEXIS 21810 (D. Conn. Sept. 11, 1997).

early as week of 11/9/98"); *Randolph v. Green Tree Fin. Corp.*, 11th Cir. No. 98-6055, Motion of Appellees To Dismiss Appeal For Lack Of Jurisdiction, at 8-9 (citing *McCarthy*, *supra*; *Seacoast Motors*, *supra*; *Napleton*, *supra*). Moreover, given that four Petitions raising the question now are pending before this Court, the Court clearly has its best opportunity to resolve the conflict among the circuits.

Respondents separately claim this Court's intervention is not required to resolve the conflict among the circuits. According to respondents, litigants can avoid the effect of the conflict or the result of any ruling by this Court simply by requesting a stay of the action rather than dismissal of the plaintiff's complaint. Even at face value, this argument is irrelevant: no matter what litigants hypothetically *could* do, district courts now *in fact* frequently dismiss plaintiffs' complaints pending arbitration. *See supra* note 3. In three circuits, those plaintiffs may immediately appeal; in five other circuits, they may not. The main purpose of the Court's modern certiorari jurisdiction is to resolve such a conflict.

Moreover, respondents are wrong on the law. Citing *Adair Bus Sales v. Blue Bird Corp.*, 25 F.3d 953 (10th Cir. 1994), respondents assert that a district court *must* enter a stay, rather than a dismissal, if a party requests only a stay under Section 3 of the Federal Arbitration Act. BIO 18-19 & n.9. Respondents fail to advise the Court, however, that on this question *Adair Bus Sales* is at the bottom of a one-to-four split in the circuits. The substantial majority rule (including in the Ninth Circuit, in which this case arose) is that a stay is *not* required: "If all the claims involved in an action are arbitrable, a court may dismiss the action instead of staying it." *Seus v. John Nuveen & Co.*, 146 F.3d 175, 179 (3d Cir. 1998); *see also Bercovitch v. Baldwin School*, 133 F.3d 141 (1st Cir. 1998); *Alford v. Dean Witter Reynolds*, 975 F.2d 1161 (5th Cir. 1992); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635 (9th Cir. 1988).

III. THE DECISION BELOW IS ERRONEOUS.

Certiorari also is warranted because the decision below is erroneous. The district court compelled arbitration and dismissed petitioners' complaint with prejudice. Pet. App. 9a. Respondents contend the district court's ruling therefore was a non-appealable order "compelling arbitration under section 206 of this title." *See* BIO at 3, 17-18 (discussing 9 U.S.C. § 16(b)(3)).[4] But Respondents ignore the full text of the statute, which distinguishes between final and interlocutory orders. The provision on which Respondents rely, 9 U.S.C. § 16(b)(3), states in full: "an appeal may not be taken from an *interlocutory order* . . . (3) compelling arbitration under section 206 of this title" (emphasis added). By contrast the statute provides unambiguously that "[a]n appeal *may* be taken from – . . . (3) a *final decision* with respect to an arbitration that is subject to this title." 9 U.S.C. § 16(a)(3) (emphasis added).

It is no accident that the statute clearly distinguishes between final and interlocutory orders. Congress added Section 16 to the Federal Arbitration Act in 1988 to clarify the appealability of district court orders regarding *interlocutory orders* regarding arbitration. *See generally* Richard J. Medalie, *The New Appeals Amendment: A Step Forward For Arbitration*, 44 ARBITRATION J. 22 (1989).[5] Section 16 was *not*

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[4] Respondents assert that because the district court in this case compelled international arbitration, its order fell within section 206, not section 4, of the Federal Arbitration Act. BIO at 3 n.2. As a result, respondents contend, this appeal is governed by 9 U.S.C. § 16(b)(3), not § 16(b)(2). Petitioners cited § 16(b)(2) because it was the provision invoked by the Ninth Circuit in the ruling below. *See* Pet. App. 19a. In any event, it makes no difference which provision is relied upon, and respondents do not contend otherwise. At bottom, the question presented is whether the district court's order was "final" and appealable or instead "interlocutory" and non-appealable. *See infra*. The analysis of that question is the same under either provision.

[5] Under this Court's *Enelow-Ettelson* doctrine, the appealability of interlocutory orders turned on whether the underlying suit was in law or equity. *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935). Even after the Court

intended to modify the established rule that final decisions, including particularly orders of dismissal, were appealable, as the Judiciary Committee's Section-By-Section Analysis explains:

> Moreover, under the proposed statute, appealability does not turn solely on the policy favoring arbitration. Appeal can be taken from final judgments, including a final judgment in an action to compel arbitration, a final judgment that refuses to enjoin arbitration, *or a final judgment dismissing an action in deference to arbitration*. These appeals preserve the general policy that appeal should be available where there is nothing left to be done in the district court.

134 Cong. Rec. S16284, S16309 (Oct. 12, 1988) (emphasis added).

The district court's order in this case was final. "The requirement of finality precludes consideration of decisions that are subject to revision, and even of 'fully consummated decisions [that] are but steps towards final judgment in which they will merge.'" *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996).[6] Here, the district court dismissed petitioners'

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overturned the doctrine in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271 (1988), the circuits divided over the appealability of orders respecting arbitration. *Compare Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420 (4th Cir. 1988) (appeal permitted from order refusing to compel arbitration) *with Rauscher Pierce Refsnes, Inc. v. Birenbaum*, 860 F.2d 169 (5th Cir. 1988) (no appeal permitted from denial of stay pending arbitration) *and Steele v. L.F. Rothschild & Co.*, 864 F.2d 1 (2d Cir. 1988) (no appeal permitted from stay pending arbitration). Congress resolved that conflict by adopting Section 16.

[6] Respondents inexplicably invoke the distinct and more stringent test for determining whether a state court has issued a "final judgment" under 28 U.S.C. § 1257. BIO at 20 & n. 10. Section 1257 has nothing to do with this case and that test is inapplicable in this context. "For purposes of more explicit comparison, it should be plain that *decisions in one area cannot be binding precedent in the other*." Robert L. Stern et al., *Supreme*

complaint with prejudice, and expressly declared its order to be "final." Pet. App. 9a, 16a. There is nothing more to be done in the district court, which permanently has divested itself of jurisdiction over the case. The district court also unquestionably believed that its "final" order was appealable, as it expressly conditioned its dismissal of petitioners' complaint on an agreement by respondents to maintain the status quo pending appeal. Pet. at 7.

Respondents rely on the rationale of those circuits that have concluded that it "is the nature of the underlying action, not the style of the District Court's decision requiring arbitration, that determines whether [an appellate court] has jurisdiction over appeals from decisions granting arbitrations." BIO at 17 (quoting *Napleton*, 138 F.3d at 1212). The statute, however, compels precisely the opposite conclusion. There is no textual support for drawing a distinction based on "the nature of the underlying action": in particular, the statute does not recognize the distinction drawn by respondents and the Ninth Circuit between embedded and independent actions. To the contrary, Section 16 unam-biguously turns on "the style of the District Court's decision": "final" decisions are appealable; "interlocutory" orders are not. *Compare* 9 U.S.C. § 16(a) *with id.* § 16(b).

Ultimately, then, respondents' argument turns on their insupportable assertion that "[t]here is no substantive difference between an order directing arbitration labeled dismissal and a like order labeled stay." BIO at 17 n.8. When a stay is imposed, the district court retains jurisdiction, and parties may move to lift the stay and seek additional relief. Here, by contrast, the case is closed permanently. For petitioners, this means a dead end. Thus, the district court compelled arbitration of petitioners' U.S. law claims despite the fact that those claims are not subject to arbitration and arise

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Court Practice § 3.4, at 95 n.9 (7th ed. 1993) (quoting 15A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3908, at 290 (2d ed. 1992)) (emphasis added).

between non-parties to the arbitration clause. Yet the French appellate courts already have declared that, under French law, this dispute between these parties is *not* arbitrable. Those rulings would bind the French tribunals if petitioners were to return there now. Petitioners could not thereafter appeal the arbitrators' refusal to assert jurisdiction to the United States courts because French law provides that petitioners can only appeal the French arbitrators' decision to the French courts. French New Code of Civil Proc., Art. 1505 (1996 ed.). Thus, unless a U.S. court reviews the district court's decision now, petitioners will lose their right to pursue their U.S. law claims without ever having received an opportunity to present those claims to any court, anywhere.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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